U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 08101025

DATE: JAN. 25, 2021

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for an Advanced Degree Professional

The Petitioner, a Korean immersion preschool, seeks to employ the Beneficiary as a curriculum specialist. It requests advanced degree professional classification for the Beneficiary under the second preference immigrant category. Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). This employment-based "EB-2" immigrant classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The Director of the Nebraska Service Center initially approved the petition, but subsequently revoked the approval on two grounds. The Director found that the evidence of record did not establish that the job offered requires an advanced degree. The Director also found that the Petitioner's status had been suspended by the State of California for non-filing of required paperwork and fees, which meant that the Petitioner had no current authority to operate and thus no *bona fide* job offer.

On appeal the Petitioner submits a brief and additional documentation, and asserts that it has overcome the grounds for revocation. In visa petition proceedings it is a petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361.

Upon *de novo* review, we will withdraw the Director's finding that the Petitioner is not currently authorized to operate and for that reason has no *bona fide* job offer. New documentation submitted by the Petitioner shows that it submitted the required paperwork and fees with the State of California to restore its active status as of July 30, 2019, and the record indicates that the Petitioner was in continuous operation during the period of lapsed status. However, we also find that the evidence submitted on appeal still does not establish that the job offered by the Petitioner requires an advanced degree. Accordingly, we will affirm the Director's finding that the petition cannot be approved for the requested classification of advanced degree professional.

I. LAW

A. Employment-based Immigrant Petition Process

Employment-based immigration generally follows a three-step process. First, an employer obtains an approved labor certification (ETA Form 9089) from the U.S. Department of Labor (DOL). *See* section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5). By approving the labor certification, the DOL certifies that there are insufficient U.S. workers who are able, willing, qualified, and available for the offered position and that employing a foreign national in the position will not adversely affect the wages and

working conditions of domestic workers similarly employed. *See* section 212(a)(5)(A)(i)(I)-(II) of the Act. Second, the employer files an immigrant visa petition with U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Third, if USCIS approves the petition, the foreign national may apply for an immigrant visa abroad or, if eligible, adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

Section 205 of the Act, 8 U.S.C. § 1155, provides that "[the Secretary of the Department of Homeland Security] may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204 [Procedure for Granting Immigrant Status]." By regulation this revocation authority is delegated to any USCIS officer who is authorized to approve an immigrant visa petition "when the necessity for the revocation comes to the attention of [USCIS]." 8 C.F.R. § 205.2(a).

B. Advanced Degree Professional Classification

A petition for an advanced degree professional must generally be accompanied by a valid, individual labor certification. 8 C.F.R. § 204.5(k)(4)(1). The regulations state that to be eligible for the requested classification, the job offer portion of the labor certification must demonstrate that the job requires a professional holding an advanced degree or the equivalent. 8 C.F.R. § 204.5(k)(4)(i). The regulation at 8 C.F.R. § 204.5(k)(2) defines "advanced degree" as follows:

> *Advanced degree* means any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree.

Thus, a proffered position in a labor certification will not qualify for advanced degree professional classification unless an advanced degree, as defined in the above regulation, is required to perform the job duties.

II. ANALYSIS

The Form I-140 petition (I-140 petition) was accompanied by a labor certification, approved by the DOL in October 2016, which provided the following job description for the proffered position of curriculum specialist:

> Under the Owner/President's guidelines, help to coordinate teaching activities; design and document monthly and yearly lesson plans; assist with monitoring students' progress; confer with parents and staff to discuss educational goals to President and work with teachers to improve educational standards; design and set up the classroom to effectively promote a child-centered learning environment; assess each child's socio-economic and emotional profile and apply appropriate child psychology

methods; etc. The education level is pre-school (early childhood), and the position is not involved with direct teaching.

The I-140 petition was initially approved in January 2017. In June 2019, however, the Director issued a notice of intent to revoke (NOIR) the approval. The Director indicated that a review of the record, consisting of materials submitted with the I-140 petition, including the labor certification and an employment verification letter from the Petitioner, as well as information provided by the Beneficiary in connection with her Form I-485 application for adjustment of status (I-485 application) and information discovered by USCIS during a site visit to the Petitioner's premises, suggested that the Beneficiary would not be employed as a curriculum specialist, as claimed on the labor certification, but rather as a preschool teacher, a position that does not require an advanced degree or even a bachelor's degree. Because the I-140 petition indicated that the job offered was not a new position, the Director surmised that the Petitioner had misrepresented the nature of the Beneficiary's employment as a nonimmigrant since 2013 for the purpose of qualifying her for second preference immigrant classification as an advanced degree professional, rather than third preference immigrant classification as a skilled worker.

The first item of misrepresentation discussed by the Director did not involve the duties or educational requirement of the job offered, but whether it is a full-time position. The Director noted that the Beneficiary had been employed by the Petitioner in the position called "curriculum specialist" since October 2013, and that the position was described as a part-time job of 25 hours per week in the Petitioner's prior Form I-129 (nonimmigrant) petition[1] and in the labor certification (section K) accompanying the instant I-140 petition. Conflicting information was provided by the Beneficiary during her I-485 interview in April 2019, however in which she stated that the position had always been a full-time job.

The next item of misrepresentation discussed by the Director involved the nature of the job in which the Beneficiary has worked since 2013 and will allegedly continue to work if the I-140 petition is approved. Whereas the job description of the curriculum specialist position in the labor certification specifically states "the position is not involved with direct teaching," this claim was contradicted by evidence that the Beneficiary had in fact performed teaching duties while employed as a "curriculum specialist." The Director discussed a 2016 printout from the Petitioner's website which identified the Beneficiary as "Head Teacher" and a 2017 facility evaluation report on the Petitioner by a California state agency which likewise identified the Beneficiary, who met with the evaluator, as a "Lead Teacher." In addition, when USCIS conducted its site visit in 2019 the only individual on the premises when USCIS arrived was the Beneficiary, which in the Director's view indicated that the Beneficiary was involved in direct teaching and cast doubt on the claim that the Beneficiary would be employed as a curriculum specialist, as asserted in the labor certification.

[1] The referenced petition, filed on May 6, 2016, sought to extend the Beneficiary's nonimmigrant classification based on the continuation of her previously approved employment under the initial I-129 petition filed in 2013. The extension petition was accompanied by an approved labor condition application (ETA Form 9035 & 9035E), certified by the DOL on April 14, 2016, which likewise identified the Beneficiary's job of "curriculum specialist" as a part-time position.

The Director discussed discrepancies in the record involving the Petitioner's employee roster, which numbered just three or four individuals, and who among the employees performed teaching duties. In view of the small staff and the small scale of the Petitioner's operation– a preschool with 13 enrolled children – the Director expressed skepticism that the Petitioner had the need for a full-time curriculum specialist.

The Director noted that the Petitioner classified the proffered position in the labor certification and the I-140 petition under the occupational code applying to education administrators, preschool and childcare center/program, and in its previous I-129 proceeding classified the proffered position under the occupational code applying to instructional coordinators, who ordinarily require a master's degree. If the position were actually that of a preschool teacher, however, it would be classified under an occupational code requiring only an associate's degree. As such, it would not be eligible for classification as an advanced degree professional position.

To resolve the foregoing conflicts the NOIR advised the Petitioner to submit additional evidence explaining the discrepancies in the record, documenting the duties of all its employees, demonstrating the need for a curriculum specialist, providing a breakdown of the time the Beneficiary will spend on each of her duties, and showing that the Beneficiary will be working in a profession.

In response to the NOIR the Petitioner submitted some, but not all, of the requested evidence. We note that the regulation at 8 C.F.R. § 103.2(b)(14) provides that failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. The Director determined that the Petitioner's response to the NOIR was insufficient to overcome the grounds for revocation.

While the Petitioner claimed that it sometimes referred to the Beneficiary as a head or lead teacher because pertinent grant application and evaluation forms did not have a category for curriculum specialist, the Director noted that the Petitioner provided no explanation for identifying the Beneficiary as head teacher on its website and for the facility evaluation report in which the Beneficiary was identified as lead teacher in a face-to-face encounter with the state evaluator. With respect to the site visit by USCIS, counsel for the Petitioner stated that the Beneficiary was the only employee present because the school had lost one teacher, another was away, and that employees had to cover for each other in special circumstances like that. This explanation was not provided by the Petitioner, however, and was not amplified by any direct input from the Petitioner. As pointed out by the Director, the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988). Nor did the Petitioner provide any explanation for various inconsistencies in its account of the USCIS site visit, as detailed in the NOIR. The Director further discussed the Petitioner's failure to address the question regarding the full- or part-time nature of the Beneficiary's previous employment with the Petitioner.

Though the Petitioner did provide documentary evidence showing who its employees were in the years 2017-2019, and that they included a lead teacher, teacher, and teacher's assistant, the Director pointed out that no detailed job descriptions were provided nor any clarification of the discrepancy regarding the identity of the lead teacher. The Petitioner explained the types of administrative work performed

by its curriculum specialist, but the Director concluded that these tasks were largely periodic in nature and did not constitute a majority of the work the position would entail during the year. The Director noted that the Petitioner did not provide a detailed breakdown of the time devoted by the curriculum specialist to specific duties, as requested in the NOIR. Based on the entire record the Director determined that more likely than not the Petitioner would not require a full-time curriculum specialist, that the proffered position would involve significant teaching duties despite the disclaimer of such in the job description, and that the position could not be classified as a profession requiring an advanced degree. Therefore, the Petitioner did not have a full-time position as curriculum specialist to offer the Beneficiary in accordance with the terms of the labor certification.

On appeal the Petitioner states that it generally has four employees aside from the director, including the curriculum specialist who is not generally involved with classroom teaching, but claims once again that there were times, due to the temporary loss of teachers, when both the director and the curriculum specialist had to help out as teachers. The Petitioner asserts that this was the situation on the day of the USCIS site visit, when the Beneficiary was the only employee present. The Petitioner reiterates that it refers to the Beneficiary as a head teacher on grant application and evaluation forms because these forms did not have a category for curriculum specialist, and that the Beneficiary is used to being referred to as a head teacher because most people do not understand what a curriculum specialist is. We are not persuaded. In the realm of education the term curriculum specialist should be well understood. As previously mentioned, the Petitioner classified the proffered position in its prior I-129 proceeding under the DOL's *Occupational Outlook Handbook* (*OOH*) code for instructional coordinator, and in the current I-140 proceeding classifies the proffered position under the standard occupational classification, SOC/O*NET, code for education and childcare administrators, preschool and daycare. As both of these occupational classifications feature curriculum development as a primary task,[2] it is evident that the Petitioner considers the proffered position of curriculum specialist to be a recognizable job within those occupational categories.

Moreover, the Petitioner has still provided no explanation for why it identified the Beneficiary as head teacher on its own website in 2016, if she was really employed as a curriculum specialist, or why the Beneficiary was identified as lead teacher to a California official who met with her while conducting a facility evaluation in 2017, if she was really employed as a curriculum specialist. The Petitioner's website printout identifying the Beneficiary as a head teacher, dated July 27, 2016, conflicts with the Petitioner's description of the Beneficiary's position as a curriculum specialist in the I-129 petition it filed on May 6, 2016, and in the labor condition application (ETA Form 9035 & 9035E) certified by the DOL on April 14, 2016, that accompanied the I-129 petition. The website printout also conflicts with the Petitioner's description of the proffered position as a curriculum specialist on the labor certification application submitted to the DOL on August 24, 2016 (certified in October 2016), and on the instant I-140 petition filed on November 17, 2016.

It is incumbent upon a petitioner to resolve any inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile such inconsistencies will not suffice without competent evidence pointing to where the truth lies. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

[2] See bis.gov/ooh/education-training-and-library/preschool-teachers-htm, and onetcodeconnector.org/ccreport/11-9031.00 (last visited January 21, 2021).

Doubt cast on any aspect of the petitioner's evidence also reflects on the reliability of the petitioner's remaining evidence. *See id.*

The Petitioner submits additional documentation on appeal which allegedly shows that the Beneficiary's job duties in the position she has held and will continue to hold with the Petitioner are those of a curriculum specialist. These materials include student observation reports by the Beneficiary and a series of calendars outlining the school's activities and study themes during the 2018-19 and 2019-20 school years. The student observation reports by the Beneficiary appear to be more closely related to a teacher's job duties than to a curriculum specialist, since they focus on the activities of the individual children. While the calendars appear to be more curricular in nature, their authorship is unclear as neither the Beneficiary nor any other employee is identified on the documents as their preparer. Moreover, the school calendars do not appear to be the types of work product that demand an inordinate percentage of the Beneficiary's work year. Furthermore, as noted by the Director in the revocation decision, the Petitioner has not provided a detailed breakdown of the time the Beneficiary spends on each of her job duties. This evidentiary deficiency, as well as others the Petitioner did not address in its response to the Director's RFE, has not been rectified on appeal.

Concerning the question of whether the proffered position has been and will continue to be a full-time or part-time job, the Petitioner submits an excerpt from its I-129 petition on behalf of the Beneficiary showing that it characterized the curriculum specialist position as not full-time with a range of 25-40 hours per week. The Petitioner explains that the Beneficiary was legally allowed to work either part-time or full-time and that the Petitioner wanted to preserve its flexibility by indicating a weekly range of 25-40 hours. Thus, it appears that the Beneficiary could have worked up to the equivalent of a full-time week on the nonimmigrant visa she received pursuant to the I-129 petition. Even if that were the case, however, it does not reconcile the Beneficiary's claim in her I-485 interview in 2019 that her job with the Petitioner had always been a full-time position with the contrary information provided by the Petitioner on the I-129 petition and certified labor condition application and on the labor certification accompanying the I-140 petition, all of which referred to the curriculum specialist as a part-time position. The record includes copies of some pay statements to the Beneficiary in 2016 and 2019, but they do not indicate how many hours the Beneficiary worked on a weekly basis. Thus, they do not establish whether the position was full-time or part-time in the past and do not confirm whether the Beneficiary's response at her I-485 interview that the position has always been full-time was truthful or not. Accordingly, the Petitioner has not submitted sufficient evidence to establish that the proffered position is full-time, as stated in the current I-140 petition, or part-time, as stated in the accompanying labor certification.

Based on the evidence of record, we agree with the Director that the position in which the Beneficiary has been working since 2013 and presumably will continue to work, in contrast to the position described on the labor certification and in the I-129 filing, appears to accord more closely with the occupation of preschool teacher as described in the *OOH*. The *OOH* states that: "Preschool teachers educate and care for children younger than age 5 who have not yet entered kindergarten. They teach language, motor, and social skills to young children." *bis.gov/ooh/education-training-and-library/preschool-teachers-htm#tab-2* (last visited January 21, 2021). The duties of a preschool teacher are listed in the *OOH* as follows:

- Teach children basic skills such as identifying colors, shapes, numbers, and letters;
- Work with children in groups or one on one, depending on the needs of children and on the subject matter;
- Plan and carry out a curriculum that focus[es] on different areas of child development;
- Organize activities so children can learn about the work, explore interest, and develop skills;
- Develop schedules and routines to ensure children have enough physical activity and rest;
- Watch for signs of emotional or developmental problems in each child and bring them to the attention of the child's parents;
- Keep records of the children's progress, routines, and interests, and inform parents about their child's development.

Id. These job duties for the occupation of preschool teacher closely reflect the duties actually performed by the Beneficiary in her job with the Petitioner, which include curriculum development and scheduling of activities, as well as observation of and reporting on children's individual interests, aptitudes, and developmental problems, notwithstanding the Beneficiary's asserted experience as a curriculum specialist. Moreover, the job duties listed in the *OOH* are consistent with the Beneficiary's identification as "lead teacher" to the California state official whom she met during the Petitioner's facility evaluation in 2017, as well as the Petitioner's description of the Beneficiary as "head teacher" on its website in 2016. Finally, the *OOH* indicates that the typical entry-level education required for a preschool teacher is an associate's degree. *Id.* Thus, the occupation of preschool teacher does not require an advanced degree, as defined in 8 C.F.R. § 204.5(k)(2).

In summation, we agree with the Director that the Petitioner has not established that job offered in this I-140 petition, which the Petitioner states is the same position in which the Beneficiary has been employed as an H-1B nonimmigrant since 2013, is one that requires an advanced degree. The Petitioner has not resolved the inconsistencies in the record concerning the Beneficiary's job title, which the Petitioner has variously referred to as head teacher, lead teacher, and curriculum specialist. Nor has the Petitioner resolved the inconsistencies concerning the Beneficiary's job duties, which appear to include as many features of a preschool teacher, or more, than of a curriculum specialist, and which the Petitioner has failed to clarify, in response to the NOIR or on appeal, with a detailed breakdown of the time the Beneficiary spends on each of her job duties. Finally, the Petitioner has not resolved conflicting evidence as to whether the proffered position, and the position in which the Beneficiary has been working since 2013, is a full-time or part-time position. As previously stated, attempts to explain or reconcile inconsistencies in the record will not suffice without competent evidence pointing to where the truth lies. *Matter of Ho, id.* The Petition has not submitted competent evidence to resolve the inconsistencies discussed above.

III. CONCLUSION

The Director's finding that the Petitioner had no *bona fide* job offer as it was out of proper status is withdrawn. However, we also find that the evidence submitted on appeal still does not establish that the actual job offered by the Petitioner, in which the Beneficiary has been employed since 2013 and will continue to be employed if the instant petition is approved, requires an advanced degree.

Therefore, the Petitioner has not established that the Beneficiary is entitled to the requested visa classification of advanced degree professional. The appeal will be dismissed for the above stated reason.

ORDER: The appeal is dismissed.